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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

Supreme Court, U.S.
FILED
MAY 20 1966
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No. ~~1339~~ 158

**ANTHONY VENTERELLA, JOSEPH BELLAVIA, WILLIE GUIDRY, INDIVIDUALLY AND AS PROPRIETORS OF THE SUDAN OYSTER CO. AND EMILE BOUVIER, JR.,**

**Petitioners,**

***versus***

**REUBEN C. PACE d/b/a PACE MARINE SERVICE, J. RAY McDERMOTT AND CO., INC., THE TRAVELERS INSURANCE COMPANY, NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO. and CERTAIN UNDERWRITERS OF LLOYDS LONDON,**

**Respondents.**

## *PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA AND/OR THE FOURTH CIRCUIT COURT OF APPEALS, STATE OF LOUISIANA.*

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ANTHONY VENTERELLA, JOSEPH BELLAVIA, WILLIE GUIDRY, INDIVIDUALLY AND AS PROPRIETORS OF THE SUDAN OYSTER CO. AND EMILE BOUVIER, JR.,

Petitioners,

*versus*

REUBEN C. PACE d/b/a PACE MARINE SERVICE, J. RAY McDERMOTT AND CO., INC., THE TRAVELERS INSURANCE COMPANY, NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO. and CERTAIN UNDERWRITERS OF LLOYDS LONDON,

Respondents.

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## *PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA AND/OR THE FOURTH CIRCUIT COURT OF APPEALS, STATE OF LOUISIANA.*

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the decree of the Supreme Court of Louisiana entered in the above case on February 4, 1966, refusing to review the judgment of the Fourth Circuit Court of Appeal, State of Louisiana,, and the decree of said Fourth Circuit Court

of Appeal rendered November 2, 1965 (rehearing denied December 6, 1965), also rendered in the above case.

## OPINIONS BELOW

The decree of the Supreme Court of Louisiana bears Docket No. 48023 of that court and is reported in 182 So. 2d 73. The opinion of the Fourth Circuit Court of Appeal bears Docket No. 1946 of that court and is reported in 180 So. 2d 240.

## JURISDICTION

The decree of the Supreme Court of Louisiana was made and entered on February 4, 1966 and certified copy thereof is appended to this petition in the Appendix at page 17. The opinion of the Fourth Circuit Court of Appeal, State of Louisiana, was made and rendered on November 2, 1965 (rehearing denied December 6, 1965), and a certified copy thereof is appended to this petition in the Appendix at page 18. An order was entered on May 5, 1966, extending to and including May 20, 1966, the time for filing this petition for a writ of certiorari.

It is believed that United States Code, Title 28, Section 1257, and United States Constitution Article 1, Section 10 and Amendment 14, Section 1 confer on this court jurisdiction to review the decrees in question by writ of certiorari.

## QUESTIONS PRESENTED

The questions presented for review are whether certain Louisiana Statutes, or the interpretations given to them by the Louisiana Courts in the instant case are repugnant to the United States Constitution, particularly Article 1, Section 10, prohibiting the passage of ex post facto laws and Amendment 14, Section 1, relative to due process of law

and equal protection of the laws. Also presented is the question of whether a United States District Court is a "court of competent jurisdiction" in a suit by several plaintiffs against several defendants where there was diversity of citizenship between all of the plaintiffs and all of the defendants except one defendant.

Specifically, the questions are, in the order in which they arose in the opinion rendered by the Fourth Circuit Court of Appeal:

1. Did Louisiana Act 31 of 1960 "incorporate" LSA-C.C. art. 3518 and LSA-R.S. 9:5801?[1]
2. Did Louisiana Act 31 of 1960 amend or repeal LSA-R.S. 12:66 by "incorporating" it into LSA-R.S. 9:5801?[2]
3. Does the misjoinder of a non-diverse defendant deprive a federal district court of jurisdiction over the **cause of action** of the plaintiffs against the other defendants?[3]
4. Does a federal district court cease to be a "court of competent jurisdiction" in a civil action by four plaintiffs against five defendants because plaintiffs lack diversity with one of the defendants joined as a joint tort feasor?

## *CONSTITUTIONAL PROVISIONS*

The provisions of the Constitution of the United States relied on are:

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[1] At 180 So. 2d 242 the Court of Appeal said:
"Since this suit was filed, Act 31 of 1960 was enacted, incorporating the two foregoing sections without change of substantive law * * *."

[2] At 180 So. 2d 242 the Court of Appeal said, referring to LSA-R.S. 12:66:
"It will be seen readily that the substance of this section, which has its source in Act 250 of 1928, seems also to have been incorporated in LSA-R.S. 9:5801, as amended."

[3] At 180 So. 2d 242, the Court of Appeal said:
"* * * the plaintiffs' joining of the non diverse defendant deprived the Federal court of jurisdiction over the *cause of action*.

*Article 1, Section 10:*

"No State shall * * * pass any * * * ex post facto Law * * * ".

*Amendment XIV, Section 1:*

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## *STATEMENT OF THE CASE*

This case arises out of a suit for damages by several plaintiffs against several defendants for damages resulting from a tort allegedly committed in Louisiana. Under Louisiana Law, joint tort-feasors are liable in solido and may be sued singly or together[4] and their insurers are subject to a direct action.[5] Suit may be brought in the parish (county) where the tort occurred or in the parish or parishes having jurisdiction over the defendants.[6] Tort actions must be brought within one year.[7] The alleged tort occurred in Jefferson Parish, which adjoins Orleans Parish, where New Orleans is located. The alleged joint tort-feasors were a natural person domiciled in Orleans Parish and a foreign corporation doing business in Louisiana with an agent for service of process in Orleans Parish. Two of the other three defendants, insurers of the alleged tort-feasors, were foreign corporations doing business in Louisiana, with the Secretary of State of Louisiana as Agent for service of process. The fifth defendant, also an insurer of one of the joint tort-feasors, was an association of Certain Underwriters at Lloyd's London doing busi-

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[4] LSA-C.C. Art. 2324;
*Williams vs. Pelican Creamery*, 30 So. 2d 575 (1st CCA La. 1947);
*Johnson vs. Legeai*, La. 1920, 147 La. 92, 84 So. 505.
[5] LSA-R.S. 22:655.
[6] LSA-R.S. 22:655.
[7] LSA-C.C. art. 3536.

ness in Louisiana with the Secretary of State as Agent for the service of process. The Secretary of State is in Baton Rouge, East Baton Rouge Parish. Jefferson, Orleans and East Baton Rouge Parishes are all within the territorial limits of the United States District Court for the Eastern District of Louisiana.

Within the one year prescriptive period, suit was brought in the New Orleans Division of the United States District for the Eastern District of Louisiana by the four plaintiffs (all natural persons and citizens of Louisiana) against the five defendants (one a natural person and a citizen of Orleans Parish, Louisiana, one a foreign corporation with an agent for service of process in Orleans Parish, Louisiana, two foreign insurance corporations with agents for services of process in East Baton Rouge Parish and one an association of foreign underwriters with agent for service in East Baton Rouge Parish).

Some defendants excepted to the jurisdiction of the United States District Court because of lack of diversity of citizenship between all plaintiffs and all defendants. At this point we come to the crux of this case. Did the joinder of the Louisiana defendant in an action by Louisiana plaintiffs against four foreign defendants stop the United States District Court from being a "court of competent jurisdiction". Plaintiffs say not and say that this was simply a misjoinder which was curable by dismissing the improperly joined party.

## *STATEMENT AS TO WHEN FEDERAL QUESTION FIRST RAISED*

The federal question was first raised in the trial court in an application for a New Trial of a Motion for Summary Judgment based on Prescription, the trial court previously having overruled an exception on the same

grounds. The federal question was reiterated by Plaintiffs in their petition for appeal, brief to the Fourth Circuit Court of Appeal, application to that court for rehearing, and in their application to the Supreme Court of Louisiana for a writ of certiorari.

## *ARGUMENT*

The Supreme Court of Louisiana, in refusing to issue a writ of certiorari in this case, said: "On the facts found by the Court of Appeal, there is no error of law in its judgment."[8] The only "fact" found by the Court of Appeal was that, under the undisputed facts[9] in this case, the United States District Court for the Eastern District of Louisiana was not a "court of competent jurisdiction." For the convenience of the Court we herewith quote in full what we consider the most significant portion of the opinion of the Court of Appeal:

> "The only issue raised on appeal is whether or not the one year prescription of LSA-C.C. art. 3536 was interrupted by plaintiffs' filing a similar action in the United States District Court for the Eastern District of Louisiana on December 23, 1959. The filing was within the prescriptive period; however, none of the defendants were cited to appear in that action until after December 27, 1959. The federal court action was later dismissed for lack of jurisdiction because one of the defendants Reuben C. Pace, doing business as Pace Marine

[8] *Venterella v. Pace*, 182 So. 2d 73, Appendix herein, p. 17.

[9] There never was any dispute between the parties hereto as to the following facts:

1. The alleged tort occurred on December 27, 1958.
2. Suit by the same plaintiffs against the same defendants was filed on December 23, 1959 in the U. S. District Court for the Eastern District of Louisiana.
3. This suit by the same plaintiffs against the same defendants was filed on March 22, 1960 in the Civil District Court for the Parish of Orleans.
4. The suit in the U. S. District Court was dismissed on March 23, 1960.

Service, was a citizen of Louisiana, as were the plaintiffs, and the essential requisite of diversity of citizenship of all the parties was therefore wanting.

"To resolve the question of whether or not prescription was interrupted requires consideration of the following Codal Article and Revised Statutes:

> " 'A legal interruption takes place, when the possessor has been **cited** to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not. The provisions of this article likewise apply to actions ex delicto, heretofore or hereafter filed, in a United States District Court of America, when and if said court holds it is not a court of competent jurisdiction.' (Emphasis added). LSA- C.C. art. 3518. (As amended by Acts 1954, No. 532, § 1.)
>
> " 'The **filing** of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon, against all defendants, including minors and interdicts.' (Emphasis added.) LSA-R.S. 9:5801.

"Since this suit was filed, Act 31 of 1960 was enacted, *incorporating the two foregoing sections* without change of substantive law to read as follows:

> " 'All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process.' LSA-R.S. 9:5801. (As

amended Act 1960, No. 31, § 1.)

"Since three of the five defendants herein are foreign corporations, it is pertinent to mention also LSA-R.S. 12:66, which reads as follows:

> " 'In all suits against corporations, all prescriptions against corporations shall be interrupted by the filing of the suit in the court having jurisdiction of the action against the corporation.'

*"It will be seen readily that the substance of this section, which has its source in Act 250 of 1928, seems also to have been incorporated in LSA-R.S. 9:5801, as amended.*

"[1] The issue before us hinges on interpretation of the phrase 'a court of competent jurisdiction' as it is used in the statutes quoted above. If the United States District Court where the action was originally filed was a court of competent jurisdiction, then prescription was interrupted under provisions of LSA-R.S. 9:5801 when the suit was **filed** on December 23, 1959, four days before prescription had run. However, if the federal court was not 'of competent jurisdiction', resort must be had to LSA-C.C. art. 3518, and interruption would not have occurred since the defendants were not **cited** until after December 27, 1959." *Venterella v. Pace*, 180 So. (2d) 240, at 241, 242. (Italics ours)

With reference to the question of whether Act 61 of 1960 had the effect of "incorporating LSA-R.S. 9:5801 and LSA-C.C. art. 3518, we think it would be more appropriate to say that LSA-R.S. 9:5801 was amended by Act 31 of 1960[10] by incorporating into it the provision contained in

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[10] In the Official Revision Comments following LSA-C.C.P. art. 421, we find the following: "In order to effectuate the purposes of this Code, legislation has been recommended proposing that R.S. 9:5801 be amended and as amended it incorporates the rule of Art. 3518 of the Civil Code and the jurisprudence to the effect that even though the action is filed in an improper venue or in a court which has no jurisdiction, prescription is interrupted by the service of citation upon the defendant." West's LSA Civil Procedure, Vol. 2, p. 253, note (e).

LSA-C.C. art. 3518 concerning interrupting of prescription by citation. The only purpose of Act 31 of 1960 was to amend, add, or repeal seven specified portions [11] of Title

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[11] The text of Act 31 of 1960 setting forth its purposes and that part of the text amending LSA-R.S. 9:5801, is as follows:

ACT No. 31

House Bill No. 188. By: Messrs. Jack, Napper, Jewell, Cashio, Lehmann, Becnel, Lancaster, Falgout, Landrieu. A. D. Brown, Barranger, Wilson, McGehee, Casey, Himel, Tapper, Vesich, J. K. Smith, Triche and Schoenberger, and Senators Ainsworth, Duplantier, Frugé, Davis, Long, O'Hara, Deichmann, Gravolet, O'Keefe and Sevier. (On recommendation of the Louisiana State Law Institute)

AN ACT

To implement the adoption of the Louisiana Code of Civil Procedure by amending Title 9 of the Louisiana Revised Statute of 1950 so as to:

(1) Amend and re-enact Sections 301, 302, 603, 731, 732, and 4501, Paragraphs B and D of Section 4502, and Sections 4601, 4622, 4721, 4866, and 5801 of Title 9;

(2) Amend Code Title IV (Book I) of Title 9 by adding a new Chapter 2 thereto, entitled "Of the Respective Rights and Duties of Married Persons";

(3) Amend Chapter 1 of Code Title VII (Book I) of Title 9 by adding a new Part V thereto, entitled "General Provisions";

(4) Amend Code Title IV (Book III) of Title 9 by adding a new Chapter 2 thereto, entitled "Of Presumptions";

(5) Amend Chapter 3 of Code Title XXI (Book III) of Title 9 by adding a new Part II thereto, entitled "Privileges to Effect Separation of Patrimony";

(6) Add, by enacting into law, the following new sections of Title 9: Section 271, providing the types of cases in which the wife may sue her husband; Section 304, providing that a court may authorize the spouses of military personnel presumed dead to remarry; Section 571, providing generally that a child may not sue his parents; Section 1424, providing for the affixing of seals on property in successions; Sections 1441-1443, providing the manner in which the successions of military personnel presumed dead may be opened and administered; Section 2701, providing that a judgment in a class action concludes all members of the class fairly represented; Sections 5011-5016, providing the rules of the separation of patrimony; and Section 5651, providing that a proceeding to probate a testament prescribes in five years from the judicial opening of the succession; and

(7) Repeal Sections 171-178, 303, 651-653, 671-674, 801-804, 821-823, 841, 1421, 1431, 1451-1455, 1512, 1551-1557, 2441, 2662, 4867, and 5501 of Title 9;

and to provide the effective date of this act.

Be it enacted by the Legislature of Louisiana:

Section 1: Sections 301, 302, 603, 731, 732, and 4501. Paragraphs B and D of Section 4502, and Sections 4601, 4622, 4721, 4866, and 5801 of Title 9 of the Louisiana Revised Statutes of 1950 are hereby amended and re-enacted to read, respectively, as follows:

* * * * *

Continued

9 of the Revised Statutes. Only if it were directly contrary to or irreconcilably in conflict with a new law would an existing one be amended, repealed, or "incorporated." [12]

The same applies with greater force to LSA-R.S. 12:66 which is found in Title 12 of the Louisiana Revised Statutes covering "Corporations and Associations". The U. S. District Court for the Eastern District of Louisiana certainly had jurisdiciton over the three foreign corporations which had agents for service of process within the territorial limits of its jurisdiction.[13]

At 180 So. 2d 243 (page 23 of the Appendix herein) the Court of Appeal said: "The Plaintiffs' joining of the non-diverse Defendant deprived the Federal Court of Juris-

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[11] (Continued)

"§ 5801. Interruption of prescription by filing of suit, service of process.

"All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process."

* * * * *

[12] "Laws may be repealed either entirely or partially, by other laws." LSA-C.C. art. 22.

"The repeal is either expressed or implied:

"It is express, when it is literally declared by a subsquent law;

"It is implied when the new law contains provisions contrary to, or irreconcilable with those of the former law.

"The repeal of a repealing law does not revive the first law." LSA-C.C. art. 23.

[13] The alleged tort occurred in Jefferson Parish, Louisiana, which adjoins Orleans Parish, where New Orleans is located. The alleged joint tort-feasors were a natural person (Reuben C. Pace) domiciled in Orleans Parish and a foreign corporation (J. Ray McDermott & Co., Inc.) doing business in Louisiana with an agent for service of process in Orleans Parish. Two of the other three defendants, insurers of the two alleged joint tort-feasors, were foreign corporations doing business in Louisiana with the Secretary of State of Louisiana as agent for service of process. The fifth defendant, also an insurer of one of the defendants, was an association of Certain Underwriters at Lloyd's, London, doing business in Louisiana with the Secretary of State of Louisiana as agent for service of process. The Secretary of State of Louisiana is in Baton Rouge, East Baton Rouge Parish. Jefferson, Orleans and East Baton Rouge Parishes are all within the territorial limits of the U. S. District Court for the Eastern District of Louisiana.

diction over the **cause of action**". The court is referring to the Defendant Pace as a "non-diverse Defendant" and implies that had not this Defendant been joined the action could not have been brought at all. The attention of the court is respectfully directed to the fact that the insurer of defendant Pace was also named in the action, which plaintiffs had a right to do under Louisiana laws which give plaintiffs the right to file a direct action against the insurer of a tort feasor. So even if defendant Pace had not been joined the court would have had jurisdiction over the cause of action. It is also respectfully submitted that the U. S. Supreme Court case cited by the court on this point involved matters which had been **removed** from the state to the federal court and subsequently dismissed. Our case does not involve the question of removal but simply one of interruption of prescription.

The second case cited by the court on this point is *Kern vs. Standard Oil Company*, 228 Fed. 2nd 699 (8th Cir. 1956) where a suit for damages was brought in the Minnesota U. S. District Court by a Minnesota citizen against another Minnesota citizen and a foreign corporation. The issue of jurisdiction was not raised by any of the parties on the trial but on appeal the question was raised by the appellate court itself. However, the court did not dismiss the case but remanded it to the district court in the following manner:

> "It is perhaps possible that the jurisdictional allegations of the complaint with respect to the defendant Hughes were defective, and that he was in fact not a citizen of Minnesota at the time the action was commenced. If so, the pleadings could be amended under Section 1653, Title 28 U.S.C.A., to show that the citizenship of the parties was such that the District Court actually had jurisdiction of the action. The parties may have thirty days from the date of this opinion in which to amend any 'defec-

> tive allegations of jurisdiction.' If the pleadings are not amended so as to establish jurisdiction on the ground of diversity of citizenship, the case must be remanded to the District Court with directions that it be dismissed for want of jurisdiction. See and compare, *Illinois Terminal R. Co. v. Friedman, supra*, 208 F. 2d 675, 676-677.
>
> "If within thirty days the pleadings are amended so as to show that the District Court had jurisdiction to try this case, this Court will proceed to a determination of the appeal on the merits. If the pleadings are not so amended, the judgment appealed from will be vacated and the case remanded with directions that it be dismissed for lack of jurisdiction." *Kern v. Standard Oil Company*, 228 F. 2d 699 at p. 701.

Again it is respectfully submitted for the consideration of the court that in the case at bar the plaintiffs could have amended their petition by deleting therefrom the defendant Pace. This would not have divested the U. S. District Court of jurisdiction of the cause of action because the insurer of Pace, a foreign insurance company, had been named also as a party defendant. We respectfully submit that this court must take judicial notice of the fact that the pleadings in the case at bar could have been so amended under Title 28 U.S.C.A., Section 1653 so as to delete the defendant Pace who had been improperly joined.

The court is reminded that this suit in the State Court was filed during the pendency of the suit filed in the Federal Court before the suit in the Federal Court was dismissed. By including defendant Pace in the Federal suit plaintiffs may have made a defective allegation of jurisdiction. Under U.S.C.A. Title 28, Section 1653, this defective allegation of jurisdiction could have been amended. In the case at bar it could have been amended by alleging (and subsequently proving) that Pace was a non-resident

of Louisiana, OR it could have been amended by deleting defendant Pace from the complaint. Since the case could have been kept in the Federal Court had plaintiffs elected to do so, we earnestly urge this court to hold that the United States District Court for the Eastern District of Louisiana was a court of **competent** jurisdiction in the case at bar, insofar as the four foreign defendants were concerned.

The Court of Appeal in the instant case relied principally on three Louisiana Court of Appeal cases,[14] all of which are clearly distinguishable from the case at bar because in each case there was only one defendant and no question of misjoinder of joint tort-feasors. Since Louisiana law permits a plaintiff to sue joint tort-feasors singly or together,[15] the U. S. District Court for the Eastern District of Louisiana was certainly a "court of competent jurisdiction" as to the defendant J. Ray McDermott & Co., Inc., one of the alleged joint tort-feasors, which was a foreign corporation with an agent for service of process in Orleans Parish, the seat of the U. S. District Court in question. Louisiana corporation law has a section pertaining to prescription which is clearly applicable here:

> "In **all suits** against corporations, **all prescriptions** against corporations shall be interrupted **by the filing** of the suit in the court having jurisdiction of the action against the corporation." LSA-R.S. 12:66 (Emphasis added)

As between the plaintiffs and the defendant J. Ray McDermott & Co., Inc. there was diversity of citizenship and

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[14] *Conkling v. Louisiana Power & Light Co.*, 166 So. 2d 68 (La. App. 4th Cir. 1964); *Sansone v. Louisiana Power & Light Co.*, 164 So. 2d 151 (La. App. 1st Cir. 1964); and *Knight v. Louisiana Power & Light Co.*, 160 So. 2d 832 (La. App. 4th Cir. 1964). The defendant in each of these three cases is the same company, a Florida corporation doing business in Louisiana with its principal office in Louisiana.

[15] Note 4, *supra*.

the amount of the claim exceeded the minimum jurisdictional amount, so the U. S. District Court for the Eastern District of Louisiana had jurisdiction of the "action against the corporation." This would also hold true of the two foreign insurance corporations. The joint tort-feasors and their insurers were liable in solido[16] so interruption of prescription against one interrupted prescription against all.[17]

As will be seen from the language of its opinion quoted above, the decision of the Fourth Circuit Court of Appeal stands or falls on the correctness of its interpretation of the effect to be given to Louisiana Act No. 31 of 1960, amending LSA-R.S. 9:5801. It is respectfully suggested that the Court erred in extending the effect of Act 31 of 1960 beyond its purpose,[18] and by giving it retrospective effect to the detriment of the rights of plaintiffs herein. It is recognized that laws relating to prescription may be considered as matters of procedure which are remedial in nature. It is conceded that, generally, procedural laws may be given retrospective effect. However it is respectfully submitted that, once a right has accrued and been exercised, it should not be taken away by giving retrospective effect to a subsequent law.[19] The Court of Appeal has deprived plaintiffs of a substantial right by giving retroactive effect to Act 31 of 1960 and by improperly construing it as having amended other laws not cov-

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[16] "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act." LSA-C.C. art. 2324.

[17] "A suit brought against one of the debtors in solido interrupts prescription with regard to all." LSA-C.C. art. 2097.

[18] The purpose was to amend LSA-R.S. 9:5801 and not LSA-R.S. 12:66. It cannot be construed to change the latter unless there was irreconcilable conflict. Note 12, *supra*.

[19] Prior to the enactment of Act 31 of 1960, the exception of prescription was pleaded in the trial court but overruled. The first exception of prescription will be found on pages 23 and 24 of the Transcript. Later, subsequent to the passage of Act 31 of 1960 it was raised again and maintained. We can only conclude that the trial court took the position that the law was changed retrospectively.

ered by it and not in conflict with it.

## *REASONS FOR GRANTING THE WRIT*

Plaintiffs should be granted this writ because the methods used and the result reached by the Fourth Circuit Court of Appeal for the State of Louisiana were and are repugnant to Article I, Section 10, and Amendment 14, Section 1, of the Constitution of the United States, in that they gave effect to an ex post facto law, deprived plaintiffs of their right of action without due process of law; and denied plaintiffs equal protection of the laws.

WHEREFORE, petitioners pray that this writ of certiorari be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the Petition for a Writ of Certiorari has been mailed postpaid to each respondent through counsel of record as follows:

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New Orleans, Louisiana, May ....., 1966.

## *APPENDIX*

SUPREME COURT OF LOUISIANA
New Orleans, 70112

Anthony Venterella et al — February 4, 1966
v.
Reuben C. Pace, d/b/a — No. 48,023
Pace Marine Service et al

In re: Anthony Venterella et al applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans

Writ refused.

On the facts found by the Court of Appeal, there is no error of law in its judgment.

/s/ JWS
/s/ JBF
/s/ FWH
/s/ EHMcC
/s/ WBH
/s/ FWS

HAMITER, J., is recused.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, February 4, 1966

/s/ Harold A. Moise, Jr.
Deputy Clerk

Court of Appeal,
Fourth Circuit
Filed Nov 2, 1965
/s/ M. J. Keenan
Clerk

COURT OF APPEAL
FOURTH CIRCUIT—STATE OF LOUISIANA

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No. 1946

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ANTHONY VENTERELLA, JOSEPH BELLAVIA, WILLIE GUIDRY, INDIVIDUALLY AND AS PROPRIETORS OF THE SUDAN OYSTER CO. AND EMILE BOUVIER, JR.

VERSUS

REUBEN C. PACE, d/b/a PACE MARINE SERVICE, J. RAY McDERMOTT & COMPANY, INC., THE TRAVELERS INSURANCE COMPANY, NATIONAL AUTOMOBILE AND CASUALTY INSURANCE COMPANY AND CERTAIN UNDERWRITERS AT LLOYDS OF LONDON

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APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS No. 379-158, DIVISION "C", HONORABLE FRED J. CASSIBRY, JUDGE.

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CHRIS T. BARNETTE, Judge

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(Court composed of Judges Richard T. McBride, Godfrey Z. Regan and Chris T. Barnette)

PELTIER AND PELTIER
ROBERT U. BLUM and CHARLES F. SEEMANN,
for plaintiffs-appellants.

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
GERARD T. GELPI
for Reuben C. Pace, d/b/a Pace Marine Service,
defendant-appellee.

JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
for J. Ray McDermott & Company, Inc., and The Travelers Insurance Company, defendants-appellees.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL

M. D. YAGER
for National Automobile and Casualty Insurance Co. and certain Underwriters at Lloyds of London, defendants-appellees.

AFFIRMED.

/s/ C.T.B.
/s/ R.T.McB
/s/ G.Z.R.

Plaintiffs brought their action in the Civil District Court for the Parish of Orleans on March 20, 1960, for damage alleged to have been caused to their oyster lease on December 27, 1958, by the negligent grounding of a tug and a barge owned, operated, or insured by the five defendants. All defendants moved for summary judgment based on the running of prescription, and judgment was entered in their favor on November 16, 1964.

The only issue raised on appeal is whether or not the one year prescription of LSA-C.C. art. 3536 was interrupted by plaintiffs' filing a similar action in the United States District Court for the Eastern District of Louisiana on December 23, 1959. The filing was within the prescriptive period; however, none of the defendants were cited to appear in that action until after December 27, 1959. The federal court action was later dismissed for lack of jurisdiction because one of the defendants Reuben C. Pace, doing business as Pace Marine Service, was a citizen of Louisiana, as were the plaintiffs, and the essential requisite of diversity of citizenship of all the parties was therefore wanting.

To resolve the question of whether or not prescription was interrupted requires consideration of the following Codal Article and Revised Statutes:

> "A legal interruption takes place, when the possessor has been **cited** to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not. The provisions of this article likewise apply to actions ex delicto, heretofore or hereafter filed, in a United States District Court of America, when and if said court holds it is not a court of competent jurisdiction." (Emphasis added.) LSA-C.C. art. 3518. (As amended by Acts 1954, No. 532, § 1.)
>
> "The **filing** of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon, against all defendants, including minors and interdicts." (Emphasis added.) LSA-R.S. 9:5801.

Since this suit was filed, Act 31 of 1960 was enacted, incorporating the two foregoing sections without change of substantive law to read as follows:

> "All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process." LSA-R.S. 9:5801. (As amended Acts 1960, No. 31, § 1.)

Since three of the five defendants herein are foreign corporations, it is pertinent to mention also LSA-R.S. 12:66, which reads as follows:

> "In all suits against corporations, all prescriptions against corporations shall be interrupted by the filing of the suit in the court having jurisdiction of the action against the corporation."

It will be seen readily that the substance of this section, which has its source in Act 250 of 1928, seems also to have been incorporated in LSA-R.S. 9:5801, as amended.

The issue before us hinges on interpretation of the phrase "a court of competent jurisdiction" as it is used in the statutes quoted above. If the United States District Court where the action was originally filed was a court of competent jurisdiction, then prescription was interrupted under provisions of LSA-R.S. 9:5801 when the suit was **filed** on December 23, 1959, four days before prescription had run. However, if the federal court was not "of competent jurisdiction", resort must be had to LSA-C.C. art. 3518, and interruption would not have occurred since the defendants were not **cited** until after December 27, 1959.

We think both the plain meaning of the statutory language and the jurisprudence of our courts emphatically support the trial judge's conclusion that the federal court was not a court of competent jurisdiction and that plaintiffs' cause of action prescribed.

In construing statutes we are constrained to give the words used therein their ordinary, usual signification. *State v. Robertson*, 241 La. 249, 128 So. 2d 646 (1961), *State v. Mack*, 224 La. 886, 71 So. 2d 315 (1954), *Charles Lob's Sons v. Karnofsky*, 177 La. 229, 148 So. 34 (1933), 82 C.J.S. Statutes, § 329b. Under this requirement, it is difficult to see how a court which has dismissed an action for lack of jurisdiction can be considered "a court of competent jurisdiction".

Specifically in point on the issue before us are three cases recently decided in this state, *Conkling v. Louisiana Power & Light Co.*, 166 So. 2d 68 (La. App. 4th Cir. 1964); *Sansone v. Louisiana Power & Light Co.*, 164 So. 2d 151 (La. App. 1st Cir. 1964); and *Knight v. Louisiana Power & Light Co.*, 160 So. 2d 832 (La. App. 4th Cir. 1964). All three cases contained the same basic problem. Suits were brought in United States District Courts in Louisiana, alleging jurisdiction based on diversity of citizenship, on actions ex delicto against a foreign corporation which had its principal place of business in Louisiana. The actions were filed within a year of the alleged torts, but in each case service of the citations was not effected until the one-year period had run. After the suits were dismissed in the federal courts for lack of jurisdiction, the plaintiffs filed their actions in Louisiana state courts. In each case, pleas of prescription were upheld and judgments entered in favor of the defendants. The judgments were all affirmed by the respective Courts of Appeal, and writs of certiorari and review were denied in all three cases by the Supreme Court.[1]

Plaintiffs attempt to distinguish the *Knight*, *Sansone*, and *Conkling* cases on the fact that there was only one party defendant in each whereas here there were five defendants, only one of which lacked the requisite diversity of citizenship with the four plaintiffs. Plaintiffs contend that the federal courts "had jurisdiction over" the four foreign defendants and could have retained jurisdiction of the cause by dismissing the single non-diverse defendant.

Pretermitting the question of whether the defendant Pace was an indispensable party and could have been dis-

[1] *Conkling v. Louisiana Power & Light Co.*, 246 La. 869, 167 So. 2d 678 (1964); *Sansone v. Louisiana Power & Light Co.*, 246 La. 596, 165 So. 2d 486 (1964); *Knight v. Louisiana Power & Light Co.*, 246 La. 79, 163 So. 2d 357 (1964).

missed, the fact remains that he was a party to the action from the time it was filed until it was dismissed. The plaintiffs' joining of the non-diverse defendant deprived the federal court of jurisdiction over the **cause of action.** *Mansfield C. & L. M. Ry. v. Swan*, 111 U.S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884); *Kern v. Standard Oil Co.*, 228 F. 2d 699 (8th Cir. 1956). In this respect, it makes no difference whether there is only one defendant as in the *Conkling*, *Sansone*, and *Knight* cases or whether there are five defendants, only one of which is non-diverse. Jurisdiction over the **cause of action** is lacking in both, and it is this fact which renders the federal district court not "of competent jurisdiction".

Plaintiffs' counsel urges in his brief that the case of *Blume v. City of New Orleans*, 104 La. 345, 29 So. 106 (1900), supports his contention that the federal court suit interrupted prescription and that Blume should control our decision here. The case was a tort action based on an injury alleged to have been sustained on March 13, 1897, and was brought in the Civil District Court for the Parish of Orleans in April, 1899, more than two years after the occurrence of the injury. The suit had been filed originally in federal court on August 28, 1897, less than six months after the injury, and was dismissed there during trial when it was discovered that plaintiff was a citizen of New Orleans. The dismissal was entered April 22, 1899. The Supreme Court said:

> "* * * Although a court may not have jurisdiction of a suit brought before it, it interrupts prescription. The legal interruption follows whether the court be competent or not. Civ. Code. arts. 3482-3484 (Rev. Civ. Code, arts. 3516, 3517) [obviously meaning 3518]. Though there may have been false representations as urged, it none the less remains that the suit was filed, in the circuit court, which must be held as having interrupted prescription."

Article 3518 at that time provided as follows:

> "A legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not." (Emphasis added.)

The most favorable interpretation of the *Blume* case from plaintiffs' standpoint is that the Court's language was ambiguous and leaves some doubt as to whether the Court held that mere filing of the federal action in and of itself interrupted prescription. We cannot believe this was intentional, but resulted from the fact that the issue of citation versus filing was not presented and therefore did not require a more specific answer. In the first place the codal provision itself required citation. Secondly, since the suit was filed August 28, 1897, and prescription would not have run until March 13, 1898, the marshal had more than six months to serve the citation. There is no indication that citation was not timely, and we must assume that service did occur before the end of the one year period. Therefore the issue as to whether filing alone without service of citation would have interrupted prescription was not before the Court.

However, if we assume, arguendo, that service of citation was not effected until prescription had run, plaintiffs are in no better position. The *Blume* case might then support the contention that mere filing interrupts prescription, but we would have in *Blume* precisely the same operative facts that we have in Conkling, Sansone, and Knight—that is, one plaintiff and one defendant in an action filed in federal court before the end of the one year period, service after the year was up, and subsequent dis-

missal for lack of jurisdiction. Such an interpretation of Blume would place it squarely in conflict with the three cases decided last year. As we pointed out above, the Supreme Court refused writs of certiorari and review in all three cases, indicating while so doing that the judgments were correct, thereby overruling the *Blume* case by implication.

Plaintiffs' counsel further relies on *Brandon v. Kansas City So. Ry.*, 7 F. Supp. 1008 (W.D. La. 1934). It is true that the court there apparently interpreted the *Blume* case, as plaintiffs argue, to mean that filing, even in an incompetent court, interrupted prescription. If so, it was in error. Clearly, the codal article requires citation. Moreover, the issue before that court was whether prescription was interrupted by a federal suit later dismissed for misjoinder—an exception that does not challenge the court's jurisdiction of the cause of action. It was this ruling that was apparently approved in *Harris v. Traders & Gen. Ins. Co.*, 200 La. 445, 8 So. 2d 289 (1942). To say that a federal suit dismissed for **misjoinder** interrupts prescription is significantly different from saying that a federal suit dismissed for **lack of jurisdiction over the cause of action** interrupts prescription.

Plaintiffs' counsel contends that if we take the view that service of citation is necessary to interrupt prescription, then plaintiffs' right to a determination of the merits is defeated by the neglect of the marshal over whom he has no control, who failed in his duty to serve the defendants timely. This contention was rejected in the *Sansone* case where service was not affected until 25 days after filing. He points out that suit was filed on December 23, 1959, and none of the defendants were served until after December 27, 1959, even though at least one of the defendants had an agent for service of process within one-half mile

of the courthouse. The marshal could hardly be charged with serious dereliction of duty since the four day period, in which service could have interrupted the running of prescription, included Christmas Day (Friday), Saturday, and Sunday. There was a court of competent jurisdiction within easy reach of plaintiffs where by the mere filing of their suit they could have interrupted prescription immediately. The choice of the forum was theirs.

In affirming the dismissal of plaintiff's suit we want to emphasize that the dismissal is based upon the plea of prescription. Motion for summary judgment is a descriptive term given to a procedural device borrowed from federal practice. Since it came into usage in our procedure, the term has been misused frequently. While the result reached in the instant case is correct, it would seem more proper to label defendants' motion a plea or exception of prescription.

The judgment appealed from dismissing plaintiffs' suit at their cost is affirmed.

AFFIRMED.

REHEARING REFUSED—
Dec. 6, 1965

WRIT REFUSED—
Feb. 4, 1966

A TRUE COPY
New Orleans May 10, 1966
/s/ J. M.Usner, Dy. Clerk
Court of Appeals, Fourth Circuit

SUPREME COURT OF THE UNITED STATES

October Term, 1965

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No. _____

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ANTHONY VENTERELLA, ET AL.,
Petitioners,

vs.

REUBEN C. PACE, D/B/A PACE MARINE SERVICE, ET AL.

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## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20th, 1966.

/s/ HUGO L. BLACK
*Associate Justice of the Supreme Court of the United States*

Dated this 5th
day of May, 1966.